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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 75

ROBERT H. JACKSON, Attorney General of the United States, on behalf of the United States, and as successor to the Alien Property Custodian,

Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, *Deceased,*

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

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SELDEN BACON,
Attorneys for Respondent.

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SELDEN BACON,
of Counsel.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinions below, that of the District Court (R. 1074-1092, 27 Fed. Supp. 44) and that of the Circuit Court of Appeals [R. 1118-1126, 109 Fed. (2d) 714] are reported under the title "*Sorenson, et al.* v. *Sutherland, et al.*"

Jurisdiction.

The order of the Circuit Court of Appeals, mistakenly called a judgment by the Petitioner, was entered March 7, 1940 (R. 1127). It reversed an order of the District Court for the Southern District of New York entered April 28, 1939 (R. 1103), which vacated for want of jurisdiction a decree of the same Court of December 30, 1929 (R. 35). Certiorari was granted on June 3, 1940 on a petition filed on May 11, 1940. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code.

Question Presented.

The Petitioner both in the petition for the writ and in his brief here asks review of a single question:

> "Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an 'enemy,' as defined by that Act."

Stated more properly, the question is:

> Whether an unappealed judgment against the Alien Property Custodian and the Treasurer of the United States under Section 9 (a) of the Trading with the Enemy Act on a claim to recover a debt out of the property of an enemy seized and held by them, which judgment had been paid eight years before the motion, may be set aside on motion for want of jurisdiction, not on the ground of newly discovered evidence, but merely on the ground that one, though not

himself a party, was the beneficial owner of the claim and an enemy, as defined in that Act, when the bill of complaint stated a case entitling the plaintiffs to relief afforded by the decree; and the ownership of the claim in suit and the question whether the now alleged beneficial owner was an enemy were both at issue, were argued by counsel at the trial and determined against the defendants.

No question whatever is raised as to the sufficiency of the bill of complaint in the action to state a case under the statute or as to whether the relief granted was within the issues and the statute.

The Statute Involved.

We reproduce here the text of the statute as far as material.

The Trading with the Enemy Act of 1917, C. 106, 40 Stat. 411 (U.S.C.A. Title 50, Appendix.)

"§ 2. Definitions. The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

The words 'ally of enemy,' as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

* * * * * * *

"The word 'person', as used herein shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

* * * * * *

§ 9. CLAIMS TO PROPERTY TRANSFERRED TO CUSTODIAN; NOTICE OF CLAIM; FILING; RETURN OF PROPERTY; SUITS TO RECOVER. (a) Any person not an enemy or ally of enemy *claiming* any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the

President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to *establish* the interest, right, title, or debt *so claimed*, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine *said claimant* is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the

defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the Court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

"§17. RULES BY DISTRICT COURTS; APPEALS. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)." (Italics ours)

Statement.

Nature of the Proceedings.—This was an independent proceeding on motion on affidavits entitled in the cause of "John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, plaintiffs, against Howard Sutherland, as Alien property Custodian, Frank White, as Treasurer of the United States, and Zentral Einkaufs-Gesellschaft m.b.H., defendants," to vacate the decree entered therein on December 30, 1929, "on the ground that the said final decree is void because this Court," i. e., the District Court, "was without jurisdiction to enter the same." (R. 5.)

The present title adopted by the Petitioner might suggest that this is a second suit between him and the Respondent and he refers in his statement to "the original action."

There has been no suit or action between the Petitioner and the Respondent. There has been but one suit—the suit of the plaintiffs Sorenson and Nielsen as above. The Respondent was not even a party to that suit. It was not even originally a party to the motion, but was permitted to intervene in the proceedings to vacate, not as a party to the suit, but solely "as one having an interest in the decree of December 30, 1929, subsequent to its entry." (R. 3, 1104.)

The Suit.—The Petitioner correctly states (brief, p. 3) that "the suit was brought under Section 9 (a) of the Trading with the Enemy Act" (R. 318-320).

In stating the allegations of the bill of complaint (id. p. 3), the Petitioner omits the important first and second paragraphs which alleged in substance that the plaintiffs at all times and that the deceased partner Sielcken up to the time of his death were citizens and residents of the United States; that the partnership of Crossman & Sielcken continued up to the death of said Sielcken; that it had its principal place of business in and was resident of the Borough of Manhattan, State of New York, had not at any time been a resident within enemy territory, and was not and had not at any time been an "enemy or ally of enemy within the meaning" of the Trading with the Enemy Act (R. 319).

The Petitioner states (brief, p. 4) that the defendants Custodian and Treasurer moved to dismiss the bill on

the grounds (b) "that no debt was owing by Z.E.G. and (c) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the Trading with the Enemy Act." (R. 337-338).

The second ground of the motion was "It appears affirmatively from the averments of the bill of complaint that no debt is owing to the plaintiffs by the Zentral Einkaufs-gesellschaft, m.b.H."

The words "to the plaintiffs" omitted by the Petitioner directly raised the question whether the surviving partners were the owners of the claim asserted; and the third ground plainly presented the question whether the case stated in the bill was one of which the Court had jurisdiction under the statute. Yet the Petitioner contends (p. 34) that so far from raising any jurisdictional question both the Government and Z.E.G. plainly manifested an intention not to do so.

All the defendants appeared generally in the action.

The Petitioner says (p. 4) that the defendants Custodian and Treasurer denied knowledge as "to the material averments concerning the transactions giving rise to the debt." But they also denied knowledge of the important first and second paragraphs of the bill, as above (R. 338).

He also says (p. 5) that the allegations of Z.E.G. that on the outbreak of the war Sielcken resided in Germany and became an alien enemy and that the firm of Crossman & Sielcken was thereby dissolved were in support of the sixth and seventh defenses, based on an alleged arbitration award in Germany against the validity of the claim.

But those allegations were contained in the fifth, separate and distinct defense and were merely realleged in the sixth and seventh (R. 328, 329). The Petitioner does not refer to the fifth defense except in a footnote (p. 5).

The averment that Sielcken owned all the assets of Crossman & Sielcken, that his estate succeeded to such assets, and that the plaintiffs are estopped from making a claim was, as the Petitioner says, in support of the defense that the claim had been adjudicated in Germany in an arbitration between Z.E.G. and Sielcken's German Executors (R. 330, 331). But, none the less, it put the question of the title to the firm assets in issue. If title to the assets passed on Sielcken's death to his German Executors, they could arbitrate the claim.

The Petitioner says (p. 5) that "the main burden of defense was borne by counsel for Z.E.G." Yet, he says in a footnote on page 8 that a settlement made with Z.E.G. subsequent to the decree was "possibly the result of a pre-trial understanding between plaintiffs' counsel and Z.E.G." That was a settlement of an indemnity agreement and was made with the full knowledge of the representatives of the United States (R. 397).

No one can doubt that the defense interposed by Mr. Hays on behalf of Z.E.G. was a genuine defense. Mr. Rhodes, trial counsel for the defendants Custodian and Treasurer, said that he had collaborated with Mr. Hays and that both were "trying to protect the fund so far as is right" (R. 804), and it will be observed that Mr. Rhodes took an active part in the trial.

At the close of the plaintiffs' case, Mr. Rhodes for the defendants Custodian and Treasurer moved to dismiss

"because of the insufficiency of the evidence," and excepted to the denial of the motion (R. 834).

At the conclusion of the evidence, all of the defendants moved for a dismissal on the ground that the plaintiffs had failed to establish "a cause of action." The motions were overruled and the defendants Custodian and Treasurer excepted (R. 863), and the Court directed the entry of its final decree of December 30, 1929, which expressly adjudged that Z.E.G. was indebted "to the plaintiffs" in the sums stated amounting to $716,130.37, and required the defendants Custodian and Treasurer to pay said sum with interest out of the property of the defendant Z.E.G. in their custody (R. 351-352).

There were no formal findings since the rule did not then require findings. The judgment therefore imports findings in favor of the plaintiffs on every issue in the case.

The Petitioner says (p. 6) that the District Court held that the risk of loss of the cargoes rested with Z.E.G. and its predecessor, "that the partnership was not dissolved by the outbreak of the war, so that the claim against Z.E.G. did not pass to Sielcken before his death and his German Executors had no power to submit the claim to arbitration" and that the Court ruled that "even though Sielcken was an 'enemy' under the Trading with the Enemy Act, he did not become an enemy under the common law doctrine that a partnership is dissolved by the outbreak of the war," and in support of those statements, refers to a colloquy between Court and counsel during the trial. At the conclusion of the trial, the Court delivered an oral opinion on two questions in the case, and only two.

One question was whether the agreement between Crossman & Sielcken and the predecessor of Z.E.G. was a contract of sale, as the defendants contended, or a contract of agency, as the plaintiffs contended. The Court squarely ruled that it was a contract of agency.

The other question was whether, under the partnership agreement, Sielcken had title to the assets of the firm so that the title passed on his death to his German Executors who thus had the right to submit the claim to arbitration, or whether the plaintiffs, as surviving partners, had title to the claim, as was expressly adjudged by the decree as above. The Court ruled that as the plaintiffs had title, those Executors had no authority or right to settle or otherwise dispose of the claim. In the course of his oral opinion, the Court stated that it was not necessary to go into the various other phases of the case. (R. 864, 865.)

There were many colloquies during the trial. The Court made no rulings whatsoever in the course of the colloquy referred to by the Petitioner. The Court did observe that he wished to give counsel ample opportunity to reverse him if he was in error (R. 854), and, after some further colloquy, said: "I am going to give you a square ruling and you can take an exception." (R. 857.) He ruled that the partnership was not dissolved upon our entry into the war, to which no exception was taken (R. 857). He made a series of rulings to which exceptions were taken (R. 858, 862). But it will be noted that he was not requested to make and did not make a formal ruling or finding on the question whether Sielcken was an enemy.

The Petitioner does not quote that part of the colloquy referred to by the Petitoner in which the Court expressed

his agreement with the counsel for the defendants Custodian and Treasurer that under the case of *Stadtmuller* v. *Miller* (11 F. 2, 732) the word "resident" as used in the Trading with the Enemy Act meant "domiciled", or the Court's statement that there is a vital distinction "between an American citizen residing in Germany and a German citizen." (R. 856.) Obviously, the distinction is that an American citizen temporarily residing in Germany would retain his American domicile.

The Petitioner erroneously states (p. 6) that the sole question actually litigated in the 1929 proceedings was "whether any debt was owing from Z.E.G." and that "no issue was raised at the trial and no determination was made by the District Court as to whether the Court was without jurisdiction," etc.

Yet, as above shown, every allegation of the complaint was put in issue by the defendants Custodian and Treasurer, except the capacities of the Custodian and Treasurer, the seizure by the latter of property of the debtor, the presentation of the claim by the plaintiffs, and performance of conditions precedent prescribed by the statute; and the answer of Z. E. G. in addition to similar denials, affirmatively alleged the very facts now relied on to deprive the Court of jurisdiction.

The Petitioner generously concedes in a footnote on page 3 that notice of the claim was filed as required by the statute and that the bill so alleged.

Issue was raised as to every other jurisdictional fact—the American citizenship and residence of the plaintiffs and likewise those of Sielcken up to his death and the continuance of the partnership of Crossman & Sielcken up to

the latter's death in October, 1917. The jurisdictional question was raised by the motion to dismiss the complaint for insufficiency, though it is no longer contended that the facts stated by the plaintiffs in their bill of complaint were not "sufficient to entitle them to equitable relief under the provisions of the Trading with Enemy Act." And the very colloquy, which the Petitioner improperly calls findings, demonstrates that those facts were a subject of debate at the trial.

The Petitioner does not quote the following statement of the Court made in colloquy with counsel:

> "In this case, the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.
>
> "I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership.
>
> * * * * * * *
>
> "It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy." (R. 852-853.)

It is obvious that the reporter erred in taking down or transcribing the language of the Court. "Precedent" was obviously substituted for "presence" and what the Court plainly said or meant to say was that it was inconceivable to him that the presence in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country results *ipso facto* in a dissolution of his partnership. In short, the Court was distinguishing between temporary residence and domicile

there which, under the *Stadtmuller* case, was necessary to make an American citizen an enemy.

Without taking any appeal, the defendants Custodian and Treasurer paid the judgment, as the Petitoner says, to the plaintiffs, and took their satisfaction on April 10, 1930 (R. 1071).

In a report to the Solicitor General, Mr. Rhodes, the trial counsel, advised against an appeal, saying among other things, the following:

> "I represented the Alien Property Custodian and the Treasurer of the United States and Mr. Hays and I co-operated fully and presented every pertinent point we could discover on behalf of the defendants. The case was heard by Judge Caffey for two days and at the conclusion of the hearing he delivered an oral opinion which was taken down in shorthand and which will be found at the end of the Transcript of Record attached hereto, in which he decided in favor of the plaintiffs.
>
> "I have gone over this Record very carefully and am convinced that the decision of the Court is correct; * * *. The plaintiffs being citizens of the United States and non-enemies within the meaning of the Trading with the Enemy Act and their debt having arisen prior to October 6, 1917, are clearly entitled to recover the same out of the funds of the debtor held by the Custodian in the Treasury of the United States pursuant to the provisions of Section 9 (a) of the Trading with the Enemy Act.
>
> * * * * * *
>
> "Inasmuch as the decision in this case is undoubtedly correct and as the enemy defendant has decided to take no appeal, there is no reason for the Alien Property Custodian and the Treasurer to take an appeal.

"I, therefore, recommend that no appeal be authorized." (R. 1015-16.)

A year before the trial, Mr. Rhodes had been made aware of the dispute whether Sielcken was domiciled in Germany or merely temporarily resident there, by a letter from Mr. Doyle, of counsel for the plaintiffs, with regard to a proposed stipulation of facts admitted before the Mixed Claims Commission before which the same claim was pending, wherein Mr. Doyle said:

> "You will note that the allegations of fact contained in our Memorial are not disputed as to any matters or as to any documents concerning which stipulation is sought. In the answer of Germany, it questions whether Mr. Sielcken was in fact a resident of the United States temporarily residing in Germany, or whether Mrs. Sielcken was such, and as to the effect of his New York will to Columbia Knickerbocker Trust Company as Executor. These matters of dispute relate only to the allegations of paragraphs (1) to (4) of our Memorial, and as to these matters stipulation is not sought." (R. 1010.)

Mr. Rhodes' attention was sharply called to the question by the answer of Z.E.G., as above, and he himself vehemently argued at the trial that Sielcken was domiciled in Germany within the ruling in *Stadtmuller* v. *Muller* (R. 854.).

Shortly after the payment of the amount awarded to the plaintiffs, the plaintiff Nielsen died and the Chase Bank as his Ancillary Executor brought a suit in the Supreme Court of the State of New York against the plaintiff Sorenson, the then sole surviving partner, the Respondent as Executor of Sielcken's Estate, and Sielcken's widow and residuary legatee, to determine the respective interests of

the parties in the recovery, Sorenson and Nielsen's Executor claiming respectively that each was entitled to 12½% of the recovery on the ground that it represented profits of the firm (R. 301, 718).

The Petitioner refers to that suit in a footnote on page 6 and says that the Government was not a party to it and that it was determined in 1933, which was three years after the suit was begun, that Respondent, as Sielcken's American Executor, had the sole right to liquidate the partnership, and that neither Sorenson nor Nielsen had been a liquidating partner, and that neither was entitled to any part of the recovery.

Doubtless the Alien Property Custodian would have been made a party to that suit but for the fact that having attempted in 1918 to seize the interest of Mrs. Sielcken in her husband's Estate on the ground that she was an enemy (R. 588-591), he released that interest in 1921 and expressly authorized the Respondent to deal with it "in the same manner as though such interest had never been reported to or demanded by the Alien Property Custodian." (Ex. O, R. 605.) Thereafter, twice as a party to accounting proceedings in the Sielcken Estate in the Surrogate's Court of New York County, by not opposing, he consented to decrees providing for the distribution of Sielcken's Estate according to the terms of his will (R. 606-617). The reason for such action was that after the war Mrs. Sielcken brought suit in California to establish her husband's and thus her own American citizenship. The Alien Property Custodian intervened and defended the suit but was beaten both at the trial and on the appeal. (*In re Sielcken*, 51 Cal. App. 538, 197 Pac. Rep. 668).

In the course of the decision in that case, the trial court said:

> "Being in Germany at the time of the outbreak of the great war, and being detained there against his desires to return to America, he steadfastly and courageously maintained that he was an American citizen, and frequently caused his assertion in that regard to be entered in the official records of the German Empire. Upon the declaration of war between the United States and Germany he was listed by the latter as an alien enemy of Germany and as an American citizen, and his property in Germany was ordered seized by the German Alien Property Custodian." (197 Pac. Rep. 670.)

It is true that at the instance of the Respondent, who was not a party to the suit resulting in the 1929 decree, it was adjudged after three years of litigation in the New York action that the Respondent as Executor was entitled to the proceeds of the recovery remaining undisposed of (R. 241), and pursuant thereto, it did receive $313,240.70 out of a total recovery of $716,130.37 and made a partial distribution of that sum (R. 305, 648).

Though that suit was solely concerned with the disposition of the recovery and not at all with the plaintiffs' right to maintain a suit for it, the New York decree did say that by virtue of the terms of the partnership agreement and of Sielcken's will, the sole right to liquidate the partnership assets and property was in the Respondent as Executor and that Sorenson and Nielsen were not and had not at any time been liquidating partners of the firm of Crossman & Sielcken, dissolved by the death of Herman Sielcken on October 8, 1917 (R. 240).

Of course, the real ground of the decision in the New York suit was, as stated in the decree, that a settlement

made in December, 1917, "was intended by the parties thereto to be and was in fact a complete and final settlement by virtue of which the plaintiff's testator," (Nielsen) "and said Sorenson each accepted the sum then paid to him in full settlement of all claims to the assets of said firm of Crossman & Sielcken and the profits of said partnership." (R. 242). In short, the Court held that a settlement made in 1917 was intended to cover a recovery made in 1930.

The District Court, in 1929, in the suit now under consideration construed the Articles of Copartnership and held that the plaintiffs did have title to the firm assets as surviving partners. So much was determined by the express adjudication of the decree that Z.E.G. was indebted to the plaintiffs in the sums stated.

The Petitioner fails to call attention to the colloquy in which the precise terms of the Copartnership Articles were called to the Court's attention in the Federal suit, by the plaintiffs therein. (R. 807). The New York Court apparently disagreed with the construction of those Articles previously adopted by the District Court. And, strange to say, the District Court in deciding the present motion even went further, reversed its own previous holding, and held that the suit was collusive because the plaintiffs had no right even to bring it (R. 1083-5).

Judge CAFFEY, who tried the case, thought that the "capital" of the firm was what was left after liquidation and payment of debts and division of profits, and that the partners had title to the firm assets. Apparently, the New York Court took a different view and Judge GODDARD, on the motion to set aside the decree for want of jurisdiction, went even further and undertook to overrule Judge CAFFEY.

There was certainly a basis for the claim of the plaintiff Sorenson and the Chase Bank representing the plaintiff Nielsen that each was entitled to a share of the recovery as profits since the United States Government imposed a tax on it as such and was paid out of the proceeds of the recovery $22,192.65 in settlement of that tax (R. 690).

Moreover, the plaintiffs were, of course, personally liable for the debts of the firm and claims were presented by alleged creditors for services in connection with the transaction out of which the debt arose amounting to 60% of the recovery (R. 718). Some of those claims were settled by payments aggregating $40,000 out of the recovery and an additional claim was still in litigation when this motion was made (R. 719, 688-699).

The Present Motion.—The Petitioner correctly says that the United States moved in 1938 to set aside the 1929 decree "on the ground that the District Court had been without jurisdiction." That was the sole ground of the motion (R. 5), and it was the sole ground stated in the order of the District Court for vacating the 1929 decree (R. 1106).

The United States was not a party to the suit. The Petitioner says that the Attorney General as successor to the Alien Property Custodian subsequently appeared as a party. He did obtain an order substituting "The Honorable Frank Murphy as Attorney General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America * * * in lieu of The Honorable Homer S. Cummings as Attorney General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America" (R.

1095), although the latter was never a moving party. However, not to be technical, the Respondent has treated the proceeding as though it was instituted in the first instance by the Attorney General as the successor to the Alien Property Custodian.

Although lack of jurisdiction was the sole ground of the motion, it was not based on the record which was not even made a part of the moving papers. It was based entirely on an affidavit of an attorney employed in the Department of Justice who did not pretend to have any knowledge of the facts and whose inferences were drawn from evidentiary matter entirely *dehors* the record and in large part relating to events which transpired subsequent to the 1929 decree (R. 7, *et seq.*). The Respondent produced the record in opposition to the motion (R. 318-352).

The truth is that the attack upon the judgment was really on a pretense of fraud in procuring it and that attack was sustained by the District Court with the statement in its opinion "that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of creating a case cognizable under the Trading with the Enemy Act." (R. 1089.)

Judge GODDARD did not so much as intimate in his opinion that the Respondent was a party to any collusion and there is nothing whatever in the two-volume record to show that it was. The Petitoner's predecessor did claim that the plaintiffs' attorney, Avery, had made a pre-trial agreement in Germany with Z.E.G. to divide the recovery. Mr. Avery stoutly denied that (R. 382-383). And his denial was fully supported by the minutes of Mr. Martin, counsel for the American Agent before the Mixed Claims

Commission, and the correspondence between him and Mr. Avery, showing that the negotiations over settlement were made in Mr. Martin's office in his presence after the entry of the decree of 1929, and that the compromise was of an extraneous claim of Z.E.G. not involved in the suit (R. 24, 25, 998-999). The Petitioner in a footnote, conceding that the question of collusion on which Judge GODDARD decided the motion is not here, says "the case will be discussed as though Sielcken's Executor had made no agreement with them to share the proceeds of recovery." (brief, p. 15.)

We shall discuss the case as though the learned Solicitor General were not the author of that and similar admittedly irrelevant insinuations throughout the brief, and we find it difficult to believe that he is the author of them.

Of course, the Circuit Court of Appeals held that a decree could not "be set aside, on the ground of fraud, nine years after it was rendered" on a motion made on affidavits (R. 1125), particularly as Judge AUGUSTUS N. HAND speaking for the Circuit Court of Appeals observed (R. 1126) "where the affidavits proved to be contradictory in respect of important issues," and although the Petitioner says in the footnote on page 7 that the "affidavits and documents disclose substantial evidence of collusion and possibly of fraud," the Petitoner does not ask for a review of that ruling, but says at the conclusion of the footnote on page 9: "This holding of the court below is not now before this Court for review."

The motion was directed only to the Chase Bank as Ancillary Executor of the plaintiff Nielsen and the plaintiff Sorenson (R. 6). Service of the motion papers on the Chase Bank was set aside by order of June 15, 1938, on a

motion in which the Petitioner joined (R. 295). The defendants Treasurer and Z.E.G. were not parties to the motion and did not appear on the motion.

It results that one of the plaintiffs, or his Executor, and two of the defendants are not parties to the motion to vacate the decree entered in the action after a trial in which all participated.

The charge of fraud and collusion on which the District Court really decided the motion is abandoned, except for the footnote references for atmosphere.

Without issues framed or a trial of them, without the production of witnesses or any opportunity for cross-examination, without findings of a trial court, this Court is asked to find from a two-volume record of conflicting inferences and statements supported by affidavit alone that Sielcken, who died before the suit was brought and whose Estate was not a party to the suit, was, in fact, an enemy, and that he was the owner of the claim, and on such basis, to set aside a nine-year old decree on the ground that the District Court did not even have jurisdiction to determine the truth of the averments of the bill of complaint.

In fact, the Petitioner seeks a retrial on affidavit of issues which the Respondent insists and the Court below found were once actually litigated and adjudged between adversary parties, including the Petitioner's predecessor.

Summary of Argument.

POINT I—Though the Petitioner must fail irrespective of whether the attack is a collateral one or by direct review, this is an independent proceeding, not a direct review as the Petitioner is driven to contend. It is not a substitute for a bill of review for fraud or newly discovered evidence.

That it cannot be a direct review is manifest from the fact that it is based not on the record, but on matters *dehors* the record. Such matters could properly be considered only [redacted] by bill for review either for fraud or newly discovered evidence.

Three of the five parties to the suit are not even parties to this proceeding by motion.

POINT II—The statute plainly conferred jurisdiction on the District Courts to entertain precisely such suits as that resulting in the decree of December 30, 1929.

The Petitioner concedes that the suit was brought under the Trading with the Enemy Act.

It is now undisputed that the bill of complaint alleged every fact essential to state a case under that Act.

The defendants all appeared generally.

The plaintiffs were not only alleged and adjudged to be, but, as a matter of undisputed fact even now, were within the class authorized to bring suit under the statute. They made a claim entitling them to the relief afforded by the statute. The District Court had jurisdiction to adjudge that claim.

POINT III—Every fact and every question of law upon which the jurisdiction of the Court depended was in issue and necessarily determined by the decree.

There is no longer any question but that all the so-called quasi-jurisdictional facts were pleaded.

It is not disputed that all were put in issue or admitted.

When there is statutory authority for a particular class of suits against the United States or an officer of the United States, they are in the same case as any other litigant and entitled to but one trial of a contested issue.

All of the cases cited by the Petitioner dealing with the facts upon which jurisdiction of the particular case depended, which, of course, have to appear by pleading or proof, arose on direct appeal from the judgment attacked.

POINT IV—There is no question of immunity in the case.

That is settled by the admission that the suit was brought under the statute and it is not denied that the bill of complaint stated a case under the statute.

POINT V—The recent decision of this Court in United States v. United States Fidelity & Guaranty Company (309 U. S. 506) has no application to this case.

POINT VI—Although strictly the question of res adjudicata is not involved, the petitioner is concluded by the decree on the very matters on which he assails the jurisdiction of the Court to render it.

The Petitioner ignores the issues raised by the pleadings, the questions raised by motions, the formal rulings

and the decree, and quotes from a selected colloquy, in which no ruling was made, to show what was litigated. The very colloquy selected and the Petitioner's quotations from it show that the allegations of fact now made by the Petitioner were likewise pressed by the defendants' counsel at the trial.

In fact, in this case the rule is applicable that the decree is conclusive not only on the questions actually raised, but on all that might have been raised. However, every question that could have been raised was, in fact, raised either by pleading or motion. It was not necessary to label those questions as jurisdictional.

ARGUMENT.

POINT I.

Though the Petitioner must fail irrespective of whether the attack is a collateral one or by direct review, this is an independent proceeding, not a direct review as the petitioner is driven to contend. It is not a substitute for a bill of review for fraud or newly discovered evidence.

While the point is of minor importance because the motion was equally untenable whether the attack on the judgment be deemed direct or collateral we briefly discuss it in order to dispose of it, so that the Court will more readily appreciate the nature of the claim that the Petitioner is trying to assert.

It is an independent proceeding.

Stevirmac Oil & Gas Co. v. *Dittman*, 245 U. S. 210.

Phillips v. *Negley*, 117 U. S. 665.

That it cannot be a direct review is manifest from the fact that it is not based on the record and from the further fact that some of the parties to the suit are not parties to the motion.

The Circuit Court of Appeals ruled that the attack on the judgment was a collateral one (R. 1123) and that ruling has not been assigned as error or brought here for review.

The cases cited by the Petitioner in support of his proposition that it is a direct review (*Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 495-496; *Cohen* v. *Portland Lodge*, 152 Fed. 357) do not sustain it.

In the former case (p. 495) Mr. Justice VAN DEVANTER, speaking for the Court, said that had the parties objecting to the authority of the Judge appeared in the suit and raised the question, "they would have been entitled to appeal. In thus seeking a correction of errors claimed to have been committed in continuing the receiverships, they would have been engaged in a direct attack," and, in referring to the fact that the attack was collateral, observed:

> "And, this being so, there was need for heeding the familiar rule that such an attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exertion of power that was possessed."

Freeman does in one place say that the doctrine of "conclusive adjudication" does not apply "to proceedings which constitute a direct attack upon the former adjudication".

2 FREEMAN ON JUDGMENTS, Sec. 627, p. 1324.

But in the immediately following section—627 (a)—he says:

> "The effect of an adjudication as *res adjudicata* is not confined in its operation to subsequent independent actions or proceedings, but is equally applicable to all ancillary or collateral proceedings in the same suit, action or general proceeding."

And in 1 FREEMAN ON JUDGMENTS, Sec. 306, p. 608, we find this:

> "Many decisions emphasize as a feature of collateral attack its attempt to step outside the record of the former judgment; the rule of such decisions is that any effort to impeach a judgment in a prior action or proceeding is collateral when it is based on allegations of facts not apparent on the face of the record, but wholly dehors the record."

Though entitled in the action, this was an independent proceeding to set aside a judgment, not because it appeared on the face of the record that it was a nullity, which is not even contended, but on allegations of facts "wholly dehors the record".

If fraud touching some matter extrinsic to the issues or newly discovered evidence is claimed, a bill of review, if seasonably brought with reasonable diligence, might have been entertained. The reasons why the Petitioner or his predecessor did not resort to that remedy are obvious. He cannot avoid the difficulties he would encounter in such a suit by the unheard of method of seeking a retrial on affidavits.

The ruling of the Circuit Court of Appeals that an issue of fraud cannot be tried on conflicting affidavits, no longer

even questioned by the Petitioner, applies with equal force to the effort to retry any issue of fact on affidavits. If newly discovered evidence is timely asserted with proper diligence, a new trial of an issue of fact may be had, but not on affidavits. This is not a suit or a proceeding to obtain a new trial on the ground of newly discovered evidence. It distinctly sought to avoid a new trial and to have the original bill dismissed without opportunity for a new trial.

Under Rule 59 of the Rules of Civil Procedure for the District Courts, adopted pursuant to the Act of June 19, 1934, Ch. 651 (28 U. S. C. 723b, 723c), a motion for a new trial may now be made on the ground of newly discovered evidence. This is not such a motion. It was made before the effective date of the rule and not in conformity with it.

It may be assumed that a mere nullity may be expunged from the record at any time, and it matters little how, whether by motion or otherwise; but that cannot be done merely because the Court committed error in the decision of a question which was properly before it for decision.

In re Metropolitan Trust Co., 218 U. S. 312, 321.

POINT II.

The statute plainly conferred jurisdiction on the District Courts to entertain precisely such suits as that resulting in the decree of December 30, 1929.

The Petitioner concedes (p. 3 of his brief) that the suit was brought "under Section 9 (a) of the Trading with the Enemy Act"; and he has abandoned the question

raised in the suit at the very outset by the defendants Custodian and Treasurer that the bill of complaint had not stated facts "sufficient to entitle them to equitable relief under the Trading with the Enemy Act." (R. 338), quite obviously because the District Court had jurisdiction to pass on that question and properly decided it.

Overlooking the first paragraph of the bill of complaint, Judge GODDARD, who granted the motion to vacate the decree, thought that the bill failed to allege the residence of the partners (R. 1081). Even if he had been right about that, he had no power on a motion, nine years after the decree, to reverse the ruling of the court which rendered the decree.

But the bill did allege that the plaintiffs were and at all times had been citizens and residents of the United States, and though that averment was put in issue by mere denials of knowledge, it has never been claimed, and there is no claim even now, that it was not true.

The statute authorized any person not an enemy or ally of enemy—["person" being defined as "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic", and "enemy" or "ally of enemy" being defined as "any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "of any nation which is an ally of a nation with which the United States is at war"]—"*claiming* any interest, right or title in any money or other property" transferred to or seized by the Alien Property Custodian, "or to

whom any debt may be owing from an enemy or ally of enemy" whose property had been so transferred or seized, to "institute a suit in equity * * * *to establish* the interest, right, title, or debt *so claimed*," and "if so established" for a direction to the Custodian and Treasurer to pay the same to *said claimant*. (Italics ours.)

There is no question even now but that the plaintiffs were within the class authorized to bring suit, and there can be no question that they claimed that a debt was owing to them by an enemy whose property had been seized by the Alien Property Custodian, and, indeed, the decree vacated by the District Court expressly adjudged that the debt was owing to them.

By appropriate denials of any knowledge (R. 338-339) the Custodian and Treasurer put in issue the status of the plaintiffs, the deceased partner Sielcken, and the partnership itself, the continuance of the partnership until Sielcken's death, the existence of the debt and the plaintiffs' right to recover it, and Z.E.G. in addition to similar denials affirmatively alleged that no debt was owing to the plaintiffs, that Sielcken became an alien enemy on the outbreak of the war, and that the firm of Crossman & Sielcken was thereby dissolved (R. 326-329).

At the close of the plaintiffs' case the Custodian and Treasurer moved, and, at the conclusion of the evidence, all the defendants moved, for a dismissal for failure to prove a case, and took exceptions to the denial of the motions (R. 834, 863).

The Petitioner appears to think that the Respondent has raised a novel and even uncertain doctrine in urging

that the District Court had jurisdiction of the "class of cases to which the one to be adjudged belongs." (Brief, p. 41). The doctrine and even the phrase are familiar to this Court.

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue."
>
> *Reynolds* v. *Stockton*, 140 U. S. 254, 268.

> "Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power."
>
> *United States* v. *Ness*, 230 Fed. 950, 953.

> "It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."
>
> *Hunt* v. *Hunt*, 72 N. Y. 217, 230; appeal dismissed 131 U. S. Appendix clxv; 24 L. Ed. 1109.

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."
>
> *Cooper* v. *Reynolds*, 10 Wall. 308, 316.

There is a plain distinction between jurisdiction of the subject matter, an abstract question, and the power to determine the facts upon which jurisdiction in a particular case depends, a concrete question. Want of the former stops the inquiry at the very threshold of the court; a decision as to the latter is the exercise of jurisdiction and is the first step to be taken in such exercise of jurisdiction.

Appeal is the method provided for the correction of errors in the exercise of such jurisdiction and, except on appeal, it is immaterial whether the court erred or not since "the test of jurisdiction is the right to decide, not right decision." (*Phebus* v. *Search*, 264 Fed. 407, 411).

Or, as put by this Court over a century ago:

> "The power to hear and determine a cause is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition that on a demurrer the Court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."
>
> *United States* v. *Arredondo*, 6 Peters 691, 709.

The Petitioner now says that regardless of what was in issue, and what was either expressly or necessarily decided by the decree, the District Court was without jurisdiction, because, as a matter of fact now attempted to be shown by extrinsic evidence, Sielcken was the owner of the claim and was a resident of Germany. Even if the

latter fact were now to be deemed established by affidavit, it would not affect the jurisdiction of the Court.

Indeed, even if the bill of complaint instead of alleging as it did that Sielcken had at all times been a citizen and resident of the United States had expressly alleged that he was a resident of Germany, the court would still have had jurisdiction to entertain the suit. That was decided by the very cases cited by the Petitioner (p. 22).

Mayer v. *Garvin*, 278 Fed. 27; 270 Fed. 229.
Sutherland v. *Mayer*, 271 U. S. 272

The Petitioner cites those cases as authority for the proposition that "a non-enemy partner of an enemy partnership had a right to recover from the Custodian his share of the seized partnership assets" (Brief, p. 22).

They do not support his proposition. On the contrary they decided that the non-enemy partner could maintain an action under Section 9 (a) of the Trading with the Enemy Act to recover *all* the firm property so seized, being accountable *after such recovery* to the Alien Property Custodian for the interests of the German partners.

The subject was considered by this Court in *Sutherland* v. *Mayer*, which was the accounting suit brought after the recovery of the property and the termination of the war.

The recovery of a debt owing by a debtor whose property had been seized by the Alien Property Custodian would necessarily stand on the same basis. The persons entitled to share in the recovery and their respective interests were matters to be determined in a proper accounting suit subsequent to recovery.

The plaintiffs claimed that each was personally entitled to 12½% of the recovery. That was not a matter

to be litigated in the suit to recover the debt. Later the plaintiff Sorenson and the representative of Nielsen pressed their respective claims for three years in the subsequent New York litigation. The result of that suit certainly did not and could not affect the jurisdiction of the District Court to entertain the suit resulting in the 1929 decree. Moreover, there were other claims which on their face amounted to 60% of the recovery, as stated *supra,* page 19.

The plaintiffs were, of course, personally liable for the firm debts, but apart from their personal liability, they had the right, and it was their duty, whether as surviving or liquidating partners, to collect the debts owing to the firm for the purpose of paying the debts of the firm, if for no other purpose. This was the construction already then placed on the terms of the partnership articles by the court in which the recovery was had. In 1918 shortly after the Respondent qualified as executor it wrote the plaintiffs requesting them "to institute such litigation as may be necessary or advisable for the collection of the obligations due the firm of Crossman & Sielcken in your names as surviving partners" (R. 353).

The New York Supreme Court action being an accounting for the proceeds of the 1929 decree was the suit in which the Alien Property Custodian might have asserted his right to Sielcken's interest if he claimed any such right. But he had long before abandoned any such claim.

But in any case, the District Court had in 1929 jurisdiction to construe the statute, to decide whether the complaint stated a case within the statute, and whether the evidence supported the case as stated, to decide whether the plaintiffs were in fact citizens and residents of the United States as they alleged, now undisputed, whether

Sielcken was a citizen and resident of the United States as alleged, and whether the partnership of Crossman & Sielcken continued right up to the death of Sielcken in October, 1917.

If it is now open to the Petitioner to retry the case on affidavits and to show, that, contrary to the express adjudication of the decree, the plaintiffs had no title to the claim and no right to sue on it or, contrary to the averments of the bill of complaint, that Sielcken was in fact a resident of Germany and that the partnership was for that reason dissolved on our entry into the war, no decree against the United States would ever have finality.

The Petitioner is in error in asserting (p. 18) that the Respondent's "fundamental assumption" is "that for purposes of the act a partnership may be treated as a separate entity." We make no such assumption. On the contrary we assume that actual enemy status of one partner would have the effect of dissolving the partnership. However, the statute, by Sec. 2 as above (pp. 3-4) does treat a partnership as an entity to the extent of having a residence, and by paragraph 2 of the bill of complaint as above it was alleged that the partnership had always had its place of business in and been a resident of the Borough of Manhattan, State of New York, and was not and never had been an enemy or ally of enemy.

Our reliance is upon a fact, not an assumption, and not even an averment of fact adjudged by the decree to be a fact, though that would suffice. It is upon the undisputed fact alleged in the first paragraph of the bill that the plaintiffs were and at all times had been citizens and residents of the United States and themselves claimed the right to recover the debt, as the creditors of Z.E.G.

POINT III.

Every fact and every question of law upon which the jurisdiction of the Court depended was in issue and necessarily determined by the decree.

It was necessarily adjudged by the decree and is now an undisputed fact that Sorenson and Nielsen were American citizens and residents of the United States. They were entitled to assert a claim under the statute. They did assert a claim under the statute, and it was for the District Court to adjudicate it.

The statute in express terms recognizes the right of claimants to bring suit. The plaintiffs were claimants. Moreover, a consent to be sued is necessarily a consent that disputed questions both of fact and law may be litigated and finally decided. The very fact that rights are to be determined by suit implies contested issues. In this instance, every contested issue must be deemed to have been decided by Judge CAFFEY in favor of the plaintiffs, and every fact alleged was either admitted or put in issue and tried and determined in 1929.

The Petitoner's contention seems to be that the United States consents to be sued only by plaintiffs who are entitled to maintain the suit, and that no matter what may be in issue and decided in the suit, it is always open to the United States to show even by affidavit that the plaintiffs were not entitled to maintain the suit.

Error in the decision of any matter of fact or law, even of the facts on which jurisdiction of the particular case depends does not deprive the court of jurisdiction and is to be corrected only on direct review on appeal.

In re Metropolitan Trust Co., 218 U. S. 312.

That is the way the question came before the Court in every one of the many cases cited on pages 25 and 26 of the Petitioner's brief.

Of course, the facts on which jurisdiction depends must appear by pleading or proof. If they do not or if the trial court errs in the decision of them, the court on appeal will reverse. That is precisely what those cases stand for and all they stand for.

In the exercise of jurisdiction, the court must determine the facts upon which jurisdiction depends, and, of course, if error is committed either in construing the statute or the pleadings or in determining the probative effect of evidence, such error can be corrected on appeal. It does not deprive the court of jurisdiction.

When there is statutory authority for a suit against the United States or an officer of the United States they are in the same position as any other litigant.

In the much quoted case of *United States* v. *Arredondo* (6 Pet. 691), the question arose whether pursuant to the statute authorizing the proceeding the court had jurisdiction of it. This court said:

"The superior court of Florida then had jurisdiction of the petition, to hear and determine the same, according to the principles of justice and the laws and ordinances of Spain; and the case is now regularly before us, on an appeal from their decree. The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and

putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law." (*Id.* 709)

In *United States* v. *Throckmorton* (98 U. S. 61), it was held that the fraud which would support an attack on a judgment or decree against the United States must be a fraud in some matter extrinsic to the issues involved, and that even perjury or the forgery of evidence would not suffice. The United States had only the same remedies as any other party.

In a *qui tam* action in the name of the United States to recover a sum of money received from the United States pursuant to an unappealed judgment of the Court of Claims on the ground that the claim was in fact fraudulent, the Supreme Court of the District of Columbia, following the rule laid down in the *Throckmorton* case and in *Cromwell* v. *County of Sac* (94 U. S. 351), held the judgment of the Court of Claims a bar because there was no averment of fraud or conspiracy that could not have been determined by way of defense in the former action.

United States, ex rel. McManus v. *Moore, et al.*, 3 MacArthur 226.

In *Meigs* v. *United States* (20 Court of Claims 181), the following was said by the Court of Claims on the subject of the binding effect of judgments against the United States, *viz.*:

"In our opinion the defendants are estopped from setting up, either here or in the Treasury Department, any defenses against the claimant's demand for services

as supervising engineer and architect of the Pension Bureau which were raised, litigated and determined in the former action between the same parties. They have had their day in court, they have submitted their defenses to a court of competent jurisdiction, and the issue has been decided against them. That issue is forever settled between the parties in all future litigation. Such is the well-settled law between citizens, as decided by the Supreme Court in elaborately considered cases. (*Beloit* v. *Morgan*, 7 Wall. 619; *Cromwell* v. *County of Sac*, 94 U. S. R. 351; *United States* v. *Nourse*, 9 Pet. 8.) *Interest reipublicae ut sit finis litium.*

"The judgment of this court might have been reviewed by the Supreme Court had the Attorney-General so elected. But he abandoned an appeal at the request, it is understood, of both the Secretary of the Interior and the Secretary of the Treasury, and his action is the action of the defendants. (*United States* v. *Babbitt*, 104 U. S. R., 767.)

"The accounting officers of the Treasury should have followed that decision in the future settlement of the claimant's accounts, because the United States are estopped from further controverting the issues adjudicated by the judgment of this court."

In a case involving the authority of a commission of the United States and its binding effect in a subsequent suit to which another officer of the United States was a party, this Court recently held that there was privity and observed, referring to earlier decisions, "As held in those cases, in general the principles of *res adjudicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or the parties."

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381.

In the suit here in question every question that could possibly be raised was raised. Every fact on which the power of the Court to entertain the particular suit depended was put in issue.

There is no reason why the United States or an officer of the United States should have more than one trial of an issue. And it is now settled law that one trial is enough.

Stoll v. *Gottlieb*, 305 U. S. 165;
Treinies v. *Sunshine Mining Co., et al.*, 308 U. S. 66;
Chicot County Dist. v. *Bank*, 308 U. S. 371;
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381;
Baldwin v. *Travelling Men's Ass'n.*, 283 U. S. 522.

The cases relied upon by the Petitioner holding that the Court in some particular case was without jurisdiction only serve to emphasize the distinction between jurisdiction of the class of cases to which the one to be adjudged belongs and power to decide the alleged facts upon which the jurisdiction invoked in a particular case depends.

In *Vallely* v. *Northern Fire & M. Ins. Co.*, 254 U. S. 348, an insurance company was adjudged an involuntary bankrupt by default on a petition of creditors which alleged that it was an insurance company and engaged in that business, although the statute conferring jurisdiction on the bankruptcy court expressly excepted insurance companies from its operation.

That case would be in point here if the bill of complaint had alleged that the plaintiffs had been residents of Ger-

many and if the defendants had defaulted. In that case, the court would have had no jurisdiction even to inquire into the facts.

Mr. Justice REED distinguished the *Vallely* case in *Stoll* v. *Gottlieb* at page 176 on the ground, among others, that there was "not an actually contested issue and order as to jurisdiction."

In the instant case, the bill alleged the American citizenship and residence at all times of the plaintiffs and of the deceased partner Sielcken as well up to the time of his death, and that the partnership continued until his death. It alleged a debt owing to the plaintiffs as surviving partners by Z.E.G.

Those allegations were put in issue by appropriate denials by all the defendants and it was specifically alleged by the defendant Z.E.G. in its answer that Sielcken was a resident of Germany upon the outbreak of the war and that no debt was owing to the plaintiffs (R. 329). Those were the typical issues likely to arise in such a suit. The United States necessarily consented to the trial of such issues when it conferre jurisdiction of such suits on the District Court.

In *Kalb* v. *Feuerstein*, 308 U. S. 433, a state court proceeded in foreclosure proceedings after it had been divested of jurisdiction by the second Frazier-Lempke Act. What the Petitioner calls a "policy favoring the finality of judgments" was not overridden in that case, as the Petitioner says (p. 36), by any "countervailing policy." There is no question here as to overriding one policy by another, i. e., the finality of judgments by sovereign im-

munity. If there be no statutory authority for a suit against the United States, there is no finality to a judgment rendered therein. But if there is statutory authority for such a suit as is brought, there is jurisdiction to decide every issue properly arising therein, including the facts upon which the jurisdiction to adjudge the particular case depends.

There is no question of one policy countervailing another, as the Petitioner supposes, and if there were, the law would be in a sad state.

In *United States* v. *Ickes,* 84 Fed. (2d) 257, the District Court assumed to review a decision of the Secretary of the Interior concededly never made, on a claim concededly never presented,—this under a statute giving a limited power of review on the law of the decision of an administrative officer and the case arose even after the time to present the claim to the Secretary of the Interior had expired.

United States v. *United States Fidelity & Guaranty Company,* the case chiefly relied on by the Petitioner, will be discussed under a separate point.

The Petitioner's argument would have point if no such statute as the Trading with the Enemy Act had ever been passed. Then, of course, the Custodian and Treasurer could not have waived immunity by appearing with or without objection.

In none of the above cases was there any occasion for any inquiry into facts upon which jurisdiction depended. The inquiry was stopped right at the threshold by matters of record—in one case, a court clothed with limited power

of review on the law was asked to review a decision of an administrative officer concededly never made; in another, a state court had been divested of jurisdiction by a federal statute; in another, a court was asked to adjudicate a cross-claim against the United States without the slightest statutory authority to do so; and in the other, a court was asked to adjudge an insurance company insolvent under a statute expressly exempting insurance companies from its operation.

The Petitioner says (p. 28): "At the trial the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death, it was the duty of the surviving partners to pay over to his executors the capital, property and business of the firm," but says that "it was never even remotely suggested that these facts raised a jurisdictional issue."

Yet he now claims that, solely by reason of those facts, the Court was without jurisdiction even to determine the claims so made and urged at the trial.

The Petitioner says (p. 31) that the express adjudication that Z.E.G. "is indebted to the plaintiffs" is only determination that it was indebted to the partnership. But the plaintiffs were Sorenson and Nielsen as surviving partners, and their title to the firm assets and right to sue recover debts owing it were concededly in issue and actually litigated, as above.

The Petitioner goes so far as to claim (pp. 32-33) that the matters in issue and decided by the decree are not to determined from the pleadings and decree, citing a

sentence from 2 FREEMAN ON JUDGMENTS, § 689, p. 1455, which, as we show *infra* (p. 51), was written on the question whether an adjudication of an isolated fact in one action was conclusive in a different action on a different claim, and also citing *Cromwell* v. *County of Sac,* (94 U. S. 351), which, as shown by the headnote quoted on p. 52, *infra,* decided that a judgment in one action when brought in question in a second action on the same claim or demand "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Finally, the Petitioner makes the extraordinary claim (p. 34) that the Government showed that it did not intend to raise any jurisdictional issue by saying in answer to the plaintiffs' averment that the bill was "filed pursuant to the provisions of Section 9 of the Trading with the Enemy Act," (R. 320) and that "this Court has jurisdiction to entertain the same," that said allegations were "statements of law which these defendants are not required to answer." (R. 329.)

We have always supposed that that was an appropriate way to challenge a mere conclusion of law. It would not have been admitted, though nothing was said about it in the answer. So far from showing an intention not to raise any jurisdictional question the answer of the defendants Custodian and Treasurer gave notice, though it was unnecessary, that they did intend to raise that question. The motion to dismiss on the ground that the bill

had not stated facts entitling the plaintiffs to equitable relief under the statute, likewise gave such notice. It was not necessary to use the word "jurisdiction", as the Petitioner seems to think.

The observation of the Circuit Court of Appeals on this point is pertinent:

> "The case at bar falls clearly within the rule of *Stoll* v. *Gottlieb* and of the *Chicot County* decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge CAFFEY, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge CAFFEY that the material facts were 'jurisdictional'; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word 'jurisdiction' the parties to the previous trial could scarcely have raised the issue of right to sue more squarely. The answer of Z.E.G. alleged that title to the claim was held by the Custodian and that the German firm of Wille & Company had a half interest in the claim. In oral argument before Judge CAFFEY, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.
>
> "The issues thus raised are the same issues which are pertinent on the 'jurisdictional' question of right to sue under the Trading with the Enemy Act. Even if Judge CAFFEY was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further." (R. 1124.)

POINT IV.

There is No Question of Immunity in the Case.

That is settled by the Petitioner's admission that this suit was brought under Section 9 (a) of the Trading with the Enemy Act.

It is settled by the bill of complaint which, as is now undisputed, alleged every fact on which the jurisdiction of the Court depended, the performance of all the conditions precedent to suit prescribed by the statute, and specifically, though that was unnecessary, that the suit was brought pursuant to the Trading with the Enemy Act.

Even if there had been a defect in pleading, (and the defendants Custodian and Treasurer asserted by motion to dismiss the bill that it was insufficient to entitle the plaintiffs to equitable relief under the statute), the unreversed decision of the Trial Court on the point would have been conclusive.

Having authorized precisely such a suit as was brought, the Congress consented that it be prosecuted according to the principles of justice, the laws of this land, and established judicial procedure.

The decision of the question whether the plaintiffs made out the case alleged was certainly the exercise of the jurisdiction conferred by the statute.

United States v. *Arredondo,* 6 Pet. 691.

Undoubtedly the authority of the United States to the bringing of suit and to the District Courts to entertain jurisdiction of it was necessary. We do not claim that such

authority could be conferred by officials either expressly or by failure to object. It had to be given by the Congress of the United States. It was given by the Congress of the United States, and, of course, that authority conferred jurisdiction upon the District Court to make a decision in favor of either party which would be an adjudication binding upon the other. Precisely this is the case in every exercise of jurisdiction.

The concession by the Petitioner that the suit was brought under Section 9 (a) of the Trading with the Enemy Act disposes of the question of immunity.

The Petitioner says (p. 41) that "it is the fact of, and not the reason for, the sovereign's lack of consent, which is fatal to the jurisdiction of the Court." That may be assumed. He also says in that connection that the United States has not authorized suits against it by enemies, and that that lack of consent in the instant case is the same as the lack of consent that a suit against the United States be prosecuted by means of a counterclaim in the *United States Fidelity & Guaranty Company* case.

But in that case there was no statutory authority to entertain the claim presented. In the instant case there was statutory authority for precisely such a suit as was brought by the plaintiffs Sorenson and Nielsen. They had to allege the facts which entitled them to sue under the statute. There is no question here but that they did allege such facts. Some of them were put in issue. The decision of each and every one of them was the exercise of a jurisdiction conferred by the statute. And it so happens that it is now undisputed that the plaintiffs were not enemies and were entitled to bring suit under the statute. Surely, the

Court had jurisdiction to decide whether they had a good cause of action and that depended in part on whether they had title to the debt sought to be established, as the trial court specifically found.

There is no question here as to which of two conflicting policies should override the other, as the Petitioner maintains. The doctrine of immunity is not a policy. Immunity from suit without consent is an inherent right of sovereignty. The doctrine of the finality of judicial decrees is not a policy—it is a rule of law maintained throughout our history. That rule of law and that right never conflict, and do not conflict here. They never operate in the same field. If the right of immunity has not been yielded in a particular field, no judgment or decree in that field has any force or effect whatsoever. That question depends on the absence or existence of a statute authorizing the suit. It does not depend on issuable facts.

As shown under the preceding point, in each of the cases holding that the Court had no jurisdiction cited and relied on by the Petitioner, either there was no statutory authority at all, or a state court was divested of jurisdiction by a federal statute.

POINT V.

The recent decision of this Court in *United States v. United States Fidelity & Guaranty Company* (309 U. S. 506) has no application to this case.

In that case, there was no statutory authority whatever for the Court, whose jurisdiction was later challenged, to entertain a suit or grant a judgment on a cross-claim against the United States as trustee for the Indian Nations,

nd it was held that immunity could not be waived by fficers of the United States by appearing and not objecting to an exercise of jurisdiction never conferred.

Of course, the immunity of the United States from suit an only be waived by act of the Congress. The Trading ith the Enemy Act conferred jurisdiction on the District ourts to entertain precisely such suits as the one here involved. It is now undisputed that the plaintiffs were within he class authorized to bring suit and it is further undisuted that the bill of complaint alleged every fact essenal to the exercise of jurisdiction by the Court and that ose facts so alleged were either admitted or put in issue the defendants who appeared generally.

The issues so raised were tried and adjudged by the ourt's decree either expressly or by necessary implication, d the officers of the United States accepted the adjudicaon and paid the judgment.

POINT VI.

Although strictly the question of *res adjudicata* is t involved, the petitioner is concluded by the decree the very matters on which he seeks to assail the risdiction of the Court to render it.

The Petitioner's effort to show, not by express rulings t by reference to colloquies occurring during the trial, t no issue as to the plaintiffs' ownership of and right to e on the claim was litigated or decided is completely met the express adjudication in the decree that Z.E.G. was lebted to the plaintiffs in the sums stated (R. 351-352),

after their right to maintain the suit had been put in issue and contested on the trial. (R. 806-807.)

His effort to make it appear that the express averment of Z.E.G. that Sielcken was an enemy and that the firm of Crossman & Sielcken was dissolved on the outbreak of the war, and that Sielcken owned the assets of the firm which passed to his German Executors was only collaterally involved in and not necessarily determined by the decision of the issue as to the binding effect of the German arbitration, completely disregards the fifth, separate and distinct defense of Z.E.G., and the express averment of the bill that Sielcken was a citizen and resident of the United States up to the time of his death and that the partnership of Crossman & Sielcken was continued right up to that time, which was put in issue by the Petitioner's predecessor and the defendant Treasurer (R. 324-326), as well as by Z.E.G. (R. 338-339). It also disregards the fact that the decision that the German arbitration was without force or effect was absolutely dependent on the finding that the plaintiffs, and not Sielcken's German Executors, owned the claim.

On a review by appeal, the Appellate Court searches the record to determine whether errors were committed, whether the issues were properly presented, whether the evidence supports the claims in issue of the prevailing party, and whether the judgment conforms to the proof and the issues. But if judicial decrees are ever to have finality, it can never be open to a defeated litigant to retry the issues on affidavits.

The Petitioner appears to think that on such a motion as this the Court may determine what was at issue and necessarily decided, not from the pleadings, formal rulings and decree, but from colloquies between court and counsel.

during the trial, which at most would only serve to shed some light on rulings actually made if under direct review.

The Petitioner quotes (brief, p. 32) FREEMAN ON JUDGMENTS (5th Ed.), § 689, p. 1455, to the effect that "It is not enough that a matter was in issue, but it must clearly appear to have been adjudicated." That quotation is from a section dealing with the question whether an adjudication of one cause of action is conclusive in a suit on a different cause of action. The Petitioner omits what immediately precedes the quotation. We supply it:

> "Except as they are necessarily involved,, matters as to which no issue was made are not concluded even though within the general scope of the litigation and even though they might have been adjudicated had they been put in issue. In order that a judgment may be an estoppel as to a particular matter, it must appear either upon the face of the record or by extrinsic evidence, that the same matter was in issue and determined in the previous action."

The question here does not arise in a suit involving another or different cause of action. It arises on a motion to vacate the very decree assailed, and it does not matter for that purpose whether the motion be regarded as having been made in the action or as the separate and independent proceeding it really is.

As to the effect of such a decree when subsequently attacked, Freeman has this to say:

> "The effect of a judgment as *res judicata* is not limited nor enlarged by the reasons given by the court for its rendition, nor by the failure of the court to give its reasons in writing on every point when required to do so by the constitution of the state.

Except in so far as this may be done by the character and scope of the judgment itself, a court has no authority by recitals in its judgment to prescribe or limit its effect as *res judicata* in subsequent litigation."

2 FREEMAN ON JUDGMENTS, § 670, p. 1414.

Each of the cases cited by the Petitioner on pages 32 and 33 of his brief to support his claim that it must clearly appear that the decision was actually based on the particular question subsequently arising emphasizes the distinction which the Petitioner fails to note between a second action on the same claim or demand and one upon a different claim or cause of action. It is well stated in the headnote to the leading case cited by him thus:

"1. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Cromwell v. *County of Sac*, 94 U. S. 351.

In the present case, the plaintiffs' ownership and right o sue on the claim was expressly adjudicated by the decree. The deceased partner's American residence and domicile were in issue, and were necessarily adjudicated by the decree, though it was silent on the subject.

In this case, there was jurisdiction of the persons. The defendants all appeared generally. There was jurisdiction of cases brought under the Trading with the Enemy Act. That is conceded.

In that situation the parties were bound not only n every question that actually was raised and decided, ut also on every question that might have been raised and ecided, including so-called quasi-jurisdictional facts.

Chicot County Dist. v. *Bank,* 308 U. S. 371, and cases cited by Mr. Chief Justice HUGHES (pp. 376-7), namely the following:

M'Cormick v. *Sullivant,* 10 Wheat. 192, 193;

Skillern's Executors v. *May's Executors,* 6 Cranch 267;

Des Moines Nav. Co. v. *Iowa Homestead Co.,* 123 U. S. 552, 557, 559;

Dowell v. *Appelgate,* 152 U. S. 327, 340;

Evers v. *Watson,* 156 U. S. 527, 533;

Cutler v. *Huston,* 158 U. S. 423, 430, 431.

Every question that could be raised was raised by tions and by answer and the decree necessarily imports decision in favor of the plaintiffs on every question cessary to it.

Thus, the Petitioner is driven to make the extraordinary claim (p. 42) that although ordinarily a juris-

dictional question, and we are here dealing with so-called quasi, not strictly, jurisdictional facts, (*Stoll* v. *Gottlieb*, 305 U. S. 165, 176; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 173, 174), once actually decided as a contested issue is *res adjudicata* in a subsequent proceeding, none the less, the rule may be overridden by a competing policy, such as the policy of "rehabilitating distressed farmers" involved in the *Kalb* case. This Court will, no doubt, be surprised to learn that in that case the law was made to yield to the policy of taking care of farmers. That policy, which was declared in the statute itself, was discussed only in dealing with the construction of the statute.

CONCLUSION.

The Petitioner asserts that the District Court was without jurisdiction to render the 1929 decree because of two facts which he claims the right to show by affidavit, regardless of what was at issue and adjudged in the suit, namely, (a) that Hermann Sielcken owned the claim in suit and that his ownership passed to his executor on his death, and (b) that he was an enemy within the meaning of the Trading with the Enemy Act. On the Petitioner's own theory the establishment of both of those facts is essential, even if he could establish them by evidence extrinsic to the record supported by affidavits alone.

Of the many reasons why the Petitioner's claim cannot prevail, the folowing will suffice, *viz.*:

First: The plaintiffs, concededly not enemies, alleged, in their bill of complaint, sufficient facts to entitle them to the relief afforded by the statute, including all the facts upon which the jurisdiction of the court depended.

The defendants, appearing generally, either admitted or nied those facts and pleaded other matter which they imed constituted affirmative defenses.

After a trial, participated in by all, a decree was en-ed expressly adjudging that Z.E.G. was "indebted to e plaintiffs" and awarding precisely the relief afforded the statute (R. 351).

The District Court had jurisdiction to decide every ques-n that did arise or could have arisen.

SECOND: The issue raised by the defendants' denial that E.G. was indebted to the plaintiffs and their assertion at Sielcken owned the claim and that his ownership passed his estate upon his death was expressly adjudged by the ree.

THIRD: The Court had jurisdiction to determine the stence, if any, of an ownership or interest in the claim, al or beneficial, which would have defeated a recovery whole or in part.

FOURTH: The legal owners were the proper parties to for the debt, being accountable after its recovery to all ing beneficial interests.

A beneficial interest even of an enemy would not have eated the plaintiffs' right of recovery (Point II, *supra*, 3), but even if it would have done so, either in whole in part, the District Court had jurisdiction to adjudge matter.

FIFTH: Even if the jurisdiction of the Court was de-dent on Sielcken's non-enemy status, that status was in issue, tried and necessarily adjudged by the 1929 ree.

The Circuit Court of Appeals said on that subject:

> "In oral argument before Judge Caffey, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.
>
> "The issues thus raised are the same issues which are pertinent on the 'jurisdictional' question of right to sue under the Trading with the Enemy Act. Even if Judge Caffey was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further. No appeal was taken and the merits of these questions cannot be now raised on a motion to vacate. No more is thus requested than a reconsideration of matters on which there was a full hearing. Once lost, the right to appeal cannot be regained in this circuitous manner." (R. 1124.)

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1940.

Robert H. Jackson, Attorney General of the United States, on behalf of the United States, and as successor to the Alien Property Custodian, Petitioner,

vs.

Irving Trust Company, as Executor of Hermann Sielcken, deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In a suit brought in the District Court of the United States for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act,[1] a decree was entered on December 30, 1929, directing payment to the plaintiffs of a stated amount out of the property of a German corporation which had been seized by the Alien Property Custodian. There was no appeal and the amount awarded was paid.

In 1938 the United States moved upon affidavits to set aside the decree, contending that the court had been without jurisdiction. The District Court granted the motion upon that ground. 27 F. Supp. 44. The Circuit Court of Appeals reversed and reinstated the original decree. 109 F. (2d) 714. Certiorari was granted. 310 U. S. 621.

It appears that the suit had been brought in 1927 by John S. Sorenson and Thorlief S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken. The bill of complaint alleged that plaintiffs and Hermann Sielcken, the deceased partner, were citizens and residents of the United States; that the partnership had its principal place of business in New York City and had not at any time been a "resident" in enemy territory and had not been an enemy or ally of enemy within the meaning of the Trading with the Enemy

[1] 40 Stat. 411, 419, as amended, 42 Stat. 1511.

Act; that Zentral-Einkaufs-Gesellschaft, m.b.H., a German corporation described as Z.E.G., was indebted to Crossman & Sielcken for cargoes purchased by the latter for Z.E.G. during 1915 and consigned to neutral ports where it had been seized and condemned by the British Government; and that the Alien Property Custodian had assets of Z.E.G. which had been seized under the Trading with the Enemy Act. The bill prayed for a decree establishing the debt claimed by the plaintiffs and ordering its payment to them out of the property so held. The bill declared that it was filed pursuant to Section 9(a) of the Trading with the Enemy Act and that the court had jurisdiction to entertain it by virtue of the express terms of that provision.

The defendants, the Alien Property Custodian and the Treasurer of the United States appeared generally. They moved to dismiss the bill on the grounds (1) that it appeared affirmatively therefrom that no debt was owing to the plaintiffs from any enemy whose property had been seized and was then held, (2) that it appeared affirmatively that no debt was owing to the plaintiffs by Z.E.G., and (3) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the provisions of the Act. The defendants also answered denying knowledge as to the averments of the bill which set forth the citizenship and residence of the plaintiffs and Sielcken and the *locus* of the partnership, and those concerning the transactions said to have given rise to the debt. As an affirmative defense, it was alleged that there were prior claims to the seized property of Z.E.G. The latter being joined as defendant also answered putting in issue allegations relating to the claim and setting up various affirmative defenses. One of these asserted that plaintiffs did not have title to the cause of action, since the Alien Property Custodian was alleged to have seized the assets of Crossman & Sielcken as an enemy firm because Sielcken resided in Germany and became an enemy. Other defenses of Z.E.G. averred that the partnership of Crossman & Sielcken had been dissolved through the outbreak of the war, and that the claim thereupon had passed to Sielcken and upon his death to his German executors who had entered into an arbitration agreement with Z.E.G., and that the arbitrators had found no liability on its part.

On the trial, at the close of the evidence on both sides, defendants moved to dismiss upon the ground that plaintiffs had failed to prove

their case. The District Court denied the motions and held that the partnership had not been dissolved by the outbreak of the war and that Z.E.G. was indebted as claimed; that the executors of Sielcken in Germany had no authority to dispose of a partnership asset which had come into existence long prior to our entering the war; and that plaintiffs were entitled to a decree for the relief prayed for. Decree was entered accordingly.

While the present motion to vacate the decree was upon the sole ground that the court had no jurisdiction to enter it, there was some attempt in the affidavits on the motion to show that the decree was collusive. But, as the Circuit Court of Appeals observed, there was no bill of review presenting such a question and no justification for setting aside a decree upon that ground merely upon affidavits. The Government expressly disclaims any challenge to that ruling. As to the question of jurisdiction, the Circuit Court of Appeals held that the District Court upon the trial of the suit was obliged to resolve disputed questions of fact and that its decision that the jurisdictional facts were established could not be attacked collaterally. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.

Petitioner thus states the question upon which review is asked in this Court: "Whether an unappealed judgment against the Alien Property Custodian under Section 9(a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an 'enemy' as defined by that Act".

Petitioner argues that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.

We hold the argument untenable. There is no question here of the sort presented in *United States* v. *United States Fidelity & Guaranty Company*, 309 U. S. 506, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity. The United States had expressly consented in Section 9(a) of the Trading with the Enemy Act that suits might be brought by a non-enemy claimant to have his claim against an enemy debtor satisfied out of the latter's property held by the Alien Property

Custodian. The pertinent parts of the section are set forth in the margin.[2]

The statute provides that any person not an enemy or ally of enemy[3] "claiming" any interest or right in the property seized or to whom any debt may be owing by the alien enemy may sue the Custodian and Treasurer. He may sue "to establish the interest, right, title, or debt so claimed". The court is to determine whether his claim is established. If the claim is "so established", the court is to order the delivery of property or payment "to which the court shall determine said claimant is entitled". Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of the claim.

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[2] "Sec. 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . .".

[3] Section 2 of the Trading with the Enemy Act provides:

"Sec. 2. The word 'enemy', as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory".

The suit in question was precisely within the terms of the Act. It was a suit by plaintiffs Sorenson and Nielsen as surviving partners, in which they alleged their citizenship and residence in the United States (and this does not now appear to be questioned), to recover a debt claimed to be owing to the firm by an enemy corporation. The allegations of the bill of complaint met the requirements of the statute in every respect. It set forth the plaintiffs' claim, their non-enemy status, the transactions out of which their claim arose, and that they had given notice of the claim as the statute required. The denials of the answers and the affirmative defenses presented issues which the court was competent to try. All these issues were necessarily before the court in the performance of its statutory duty to determine whether the plaintiffs had established their claim to the debt. Thus, the status of the plaintiffs, of the partnership, and of Sielcken, the deceased partner, the effect of his death, his interest in the assets under the partnership agreement, the nature of the transactions with Z.E.G., whether it was indebted to the firm and whether the surviving partners were entitled to recover the debt, that is, every issue which could be litigated in the suit was by the very terms of the Act submitted to the determination of the court.

Petitioner says that the jurisdictional point was not contested or adjudicated at the trial. That, while the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death it was the duty of the surviving partners to pay over to his executor the capital, property and business of the firm, it was not suggested that these facts raised the jurisdictional issue. Petitioner urges that the District Judge held that while Sielcken may have been an 'enemy' as defined in the Act, 'he did not become an enemy within the meaning of the dissolution doctrine, at least so far as transactions occurring prior to the war were concerned'. And to support the argument, petitioner relies upon a colloquy between the District Judge and counsel in the course of the trial. Respondent rejoins that in the same colloquy the District Judge observed that 'the partnership agreement was between American citizens' and that it did not follow from the war and the provisions of the Trading with the Enemy Act that Sielcken was 'an alien enemy in the sense that a national of the country with which we are at war is an alien enemy'. And the District Judge further observed that the status

of the property in question 'had become fixed prior to the war' and that it was not a consequence of the war that the partnership was so far dissolved 'as to change the rights with respect to that property'. From any point of view, the colloquy affords no adequate basis for petitioner's contention. We agree with the Circuit Court of Appeals that when the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue under the Trading with the Enemy Act.

By the provisions of that Act the jurisdiction of the District Court attached when the suit was brought upon the claim which the plaintiffs as non-enemy claimants set forth. However the issues were labeled the court was authorized to determine them. *Texas & Pacific Rwy. Co.* v. *Gulf, C. & S. F. Rwy. Co.*, 270 U. S. 266, 274; *Stoll* v. *Gottlieb, supra*, p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 479; *Chicot County Drainage District* v. *Baxter State Bank, supra; Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken.

The judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice MURPHY took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.